

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KEVIN C. BRATHWAITE,)
)
Petitioner,)
)
v.) Civ. Action No. 13-101-GMS
)
DAVID PIERCE, Warden, and)
ATTORNEY GENERAL OF)
THE STATE OF DELAWARE,)
)
)
Respondents.)

MEMORANDUM

I. INTRODUCTION

Presently before the court is a petition for writ of habeas corpus under 28 U.S.C. § 2254 filed by petitioner Kevin C. Brathwaite (D. I. 1). For the reasons set forth below, the court will summarily dismiss the petition for failing to assert an issue cognizable on federal habeas review.

II. BACKGROUND

In October 2009, the court denied Brathwaite's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 after determining that his claims failed to warrant relief under § 2254(d). *See Brathwaite v. Carroll*, Civ. A. No. 06-472-GMS, D.I. 32. However, the court issued a certificate of appealability with respect to claim one. Brathwaite appealed, and the Third Circuit Court of Appeals affirmed the denial of Brathwaite's petition on March 22, 2011. *Id.* at D.I. 40. On June 27, 2011, Brathwaite filed another notice of appeal regarding the denial of his habeas petition, this time appealing the five issues for which the court had not issued a certificate of appealability. *Id.* at D.I. 42. The Third Circuit Court of Appeals dismissed that appeal for

lack of jurisdiction due to untimely filing. *Id.* at D.I. 45.

Thereafter, in May 2012, Brathwaite filed a “motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(d),” contending that the Third Circuit failed to provide him with personal notification that it denied his petition for rehearing with respect to the dismissal of his second notice of appeal. *Id.* at D.I. 48. This court denied the motion. *Id.* at D.I. 52.

Following that decision, Brathwaite filed the petition for writ of habeas corpus under 28 U.S.C. § 2254 presently pending before this court. (D.I. 1) The petition re-asserts Brathwaite’s argument regarding the Third Circuit’s failure to personally notify him when it denied his second notice of appeal. (D.I. 1)

III. STANDARD OF REVIEW

A district court judge may summarily dismiss a habeas petition “if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief.” Rule 4, 28 U.S.C. foll. § 2254. Federal habeas relief is unavailable to a state prisoner unless he “is in custody in violation of the Constitution or laws . . . of the United States.” See 28 U.S.C. § 2254(a) and (d).

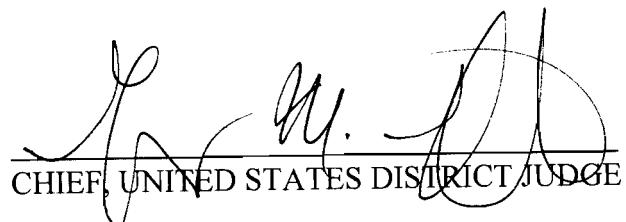
IV. DISCUSSION

Having reviewed the face of the instant petition, the court concludes that summary dismissal is appropriate in this case. Brathwaite’s complaint about the Third Circuit’s alleged failure to notify him about its dismissal of his second notice of appeal does not challenge the constitutionality or legality of his conviction and/or custody. Therefore, the petition does not assert a basis for § 2254 relief.

V. CONCLUSION

For the aforementioned reasons, the court will summarily dismiss Brathwaite's § 2254 petition. The court will also decline to issue a certificate of appealability because Brathwaite has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); 3d Cir. L.A.R. 22.2 (2011); *United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997). A separate order will be entered.

Dated: *Nov 18*, 2013



CHIEF, UNITED STATES DISTRICT JUDGE